

# State/Tribal Assumption of the CWA §404 Program

## OVERVIEW FOR FLORIDA

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U.S. EPA



# Overview\*

\* For this presentation: state refers to state or tribe

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- Clean Water Act (CWA) §404 Assumption Authority - Statute and Regulations
- EPA's role in CWA §404 Assumption
- CWA §404 Assumption Criteria
- Assumption Request
- Assumption Approval Process
- EPA oversight
  - State Permit Process Once Assumed
  - Annual Reporting and Consistency
- Additional Activities: Assumable Waters Federal Advisory subcommittee
- Contact Information
- Additional Information

# Assumption Authority

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## ➤ CWA §404(g)

- States may assume administration of the permit and enforcement program for certain waters
  - Assumable Waters subcommittee sending recommendations on how to clarify these waters to Administrator Pruitt

## ➤ CWA §404(h) and 40 CFR part 233

- Lists state requirements for assumption
- Lists EPA responsibilities: approval and oversight of assumed program
- Lists requirements and process for review and modification of state program (as necessary)

# CWA §404 Assumption Authority cont.

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- CWA §404(h-l) and 40 CFR part 233 describe:
  - State and tribal program requirements
  - Procedures EPA follows and criteria EPA applies in the approval and oversight of CWA §404(g) programs
    - includes (b)(1) guidelines, public notice and comment procedures, federal coordination
  - Process to request approval of state/tribal 404 program - 120 day process, can be extended
  - Assumption request package contents including:
    - Description of the scope and structure of the state or tribes program
    - Memorandum of Agreement with EPA – includes program administration and enforcement coordination
    - Memorandum of Agreement with USACE – includes **list of waters that are not assumed by the state or tribe** – the USACE retains permitting authority over these waters

# EPA's Role

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- Prior to assumption
  - Work with states to enhance capacity/capability and develop programs
  - Wetland Program Development Grants
- Evaluate and approve/disapprove state assumption request
- Oversight of assumed program
  - Coordinate federal oversight of permits
  - Review of modifications of state program
  - Withdraw program approval, if needed

# CWA §404 Assumption Criteria

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➤ State or Tribal programs must be:

- consistent with and
- no less stringent than the Act and implementing regulations

➤ State or Tribal programs must:

- Have equivalent scope of jurisdiction\*
- Regulate at least the same activities
- Provide for sufficient public notice and allow public participation
- Ensure compliance with the CWA 404(b)(1) guidelines
- Have adequate enforcement authority

\* State or tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope

# Assumption Request

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- Governor transmits to the Regional Administrator
- Complete assumption request package must include:
  - Letter from Governor
  - Complete program description
  - Attorney General's statement
  - MOA with EPA Regional Administrator
  - MOA with Secretary of Army (through Chief USACE)
  - All applicable state statutes and regulations administering the program

# Assumption Approval Process

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- Assumption package submitted to EPA
  - 30-day EPA review for package completeness
    - Complete – state notified; Incomplete - package returned to state
  - EPA has 120 days to approve or disapprove the state request\*
- Review period includes:
  - State notification that package is complete
  - Package sent to USACE, USFWS and NMFS  $\leq 10$  days (comments to EPA  $\leq 90$  days)
  - Notice of assumption request published in Federal Register and newspapers
    - 45-day comment period
    - Public hearing  $\geq 30$  days after Federal Register notice published

\* FL and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval.



# Assumption Approval Process cont.

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- EPA Region 4 reviews the request
  - Consults with tribes as appropriate (EO 13175)
  - Responds to comments - in final Federal Register Notice
  - Sends direct response to USACE, USFWS (and NMFS)
  - Coordinates with EPA headquarters
    - EPA headquarters concurrence – Water, Enforcement and General Counsel
  - 120-day review period may be extended by the state and EPA
- Region 4 Administrator will approve or disapprove assumption request
  - Upon approval, state is notified and notice is published in the Federal Register
  - If program is not approved, the state is notified and provided a list of necessary revisions needed to obtain approval

# EPA Oversight

## State Permit Process Once Assumed

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- State transmits to EPA notice of every permit application received
- EPA reviews permits, where federal review is not waived
  - EPA coordinates USACE, USFWS, & NMFS comments
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- If EPA's objection is not resolved, permit is transferred to USACE

# EPA Oversight cont.

## State Permit Process Once Assumed cont.

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### Waiver of review:

- MOA with EPA identifies categories of projects for which EPA review is waived
- EPA cannot waive review of:
  - Draft general permits
  - Discharges that may impact endangered species
  - Discharges that may adversely impact waters of another state
  - Discharges with known or suspected toxic or hazardous pollutants
  - Discharges proximal to public water supply intakes
  - Discharges within critical State/Federal areas

# EPA Oversight cont.

## State Permit Process Once Assumed cont.

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### ➤ Review of permits not waived.

#### ○ EPA may require review of additional categories or all permits e.g.,

##### ➤ In NJ, EPA also reviews NJ permits that

- ◊ fill  $\geq 5$  acres of freshwater wetlands or state open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of  $\geq 5$  acres of freshwater wetlands or state open waters
- ◊ are culvert enclosures of  $>100$  feet with  $>200$  cubic yards of fill
- ◊ channelize  $>500$  feet of a river or stream

##### ➤ In MI EPA also reviews MI permits that

- ◊ discharge into critical areas
- ◊ are major discharges as defined in the MOA e.g., culverts  $>100$  feet, wetlands fill  $>10,000$  yds<sup>3</sup> of material

# EPA Oversight cont.

## Annual reports and consistency

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- Program Annual Reporting
  - State submits draft annual reports
  - Draft annual report made available for public review
- Ensures state program remains consistent with the CWA and implementing regulations
  - Ensure new statutory or regulatory requirements adopted by the state e.g., Mitigation regulations
  - Review of any changes to the state program
- Periodic program review and evaluation
- Withdrawal of program approval (if necessary)

# Additional Activities

## Assumable Waters: Federal Advisory Subcommittee

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- At request of state organizations, EPA established NACEPT\* subcommittee - 9/15

**Charge:** “. . . to provide advice and recommendations to EPA on how to clarify for which states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority.”

- Status: NACEPT approved the report and is transmitting recommendations to Administrator Pruitt

- 2 majority and 2 minority recommendations
- Administrator will consider these

- Webpage: <http://www.epa.gov/cwa-404/assumable-waters-sub-committee>

\* National Advisory Council for Environmental Policy & Technology

# Contacts

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## ➤ Contact information:

- EPA Region 4: Thomas McGill, E-mail:
- EPA Headquarters: Kathy Hurlid, E-mail: [Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)
- FACA on Assumable Waters:
  - DFO: Jake Strickler, E-mail: [Strickler.Jacob@epa.gov](mailto:Strickler.Jacob@epa.gov)
  - Technical: Kathy Hurlid, E-mail: [Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)

# Additional Information

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# Summary of Recommendations

## NACEPT's Assumable Waters Subcommittee

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- Several process recommendations were supported by all
- Majority recommendations:
  - *Waters to be retained* – Primary Dependence on Rivers and Harbors Act Section 10 Lists of Navigable Waters to Define USACE Retained Waters. (*Waters Alternative B*)
  - *Wetlands to be retained* -- USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default. (*Wetlands Alternative C3*)
- **USACE recommendations:**
  - *Waters to be retained* – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters. (*Alternative C*)
  - *Wetlands to be retained* – USACE Retains All Adjacent Regardless of Furthest Reach. (*wetlands Alternative A*)

# Complete Assumption Request Package

## *Program Description Includes:*

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- Scope and structure of program
  - ◊ Jurisdiction
  - ◊ Activities regulated
  - ◊ Anticipated coordination
  - ◊ Permit review criteria
  - ◊ Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of state agency(ies) responsible for program administration
- Funding and staffing levels

# Complete Assumption Request Package

*Program Description cont.*

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- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under state jurisdiction and those under USACE jurisdiction
- Best management practices proposed to satisfy farm, forest and temporary mining roads exemption provisions

# Complete Assumption Request Package

*Attorney General's Statement Includes:*

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- Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- Analysis of authority over Indian lands
  - Note, not assuming authority over Indian lands does not constitute partial assumption

# Complete Assumption Request Package

*MOA with EPA Region 4 Administrator would include:*

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- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and MT state roles and coordination regarding:
  - Compliance monitoring
  - Enforcement
- Provisions for modification of the MOA
  - Including transfer or withdrawal

# Complete Assumption Request Package

*MOA with USACE would include:*

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- Description of waters of the U.S. over which USACE retains jurisdiction which are:
  - ◊ Waters presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce and their adjacent wetlands.
  - ◊ *Tidal waters and their adjacent wetlands*
- Procedures for transfer of pending permit applications upon program approval
- Identification of any USACE general permits to be assumed by FL
  - ◊ Including a plan for transferring responsibility
  - ◊ Identification of current enforcement cases